87-1559

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1988

QUESTIONS PRESENTED

1. Under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, is mailed service effective even though the defendant does not return the Form 18-A acknowledgment?

2. Under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, is mailed service effective outside the territorial limits of the forum state?

3. After an unsuccessful attempt at mailed service under Rule 4(c)(2)(C)(ii), may a plaintiff make a valid "place of abode" substituted service outside the forum state, on a nonresident of the forum state:

(a) Under Federal Rule 4(d)(1); or

(b) Under the long-arm statute of the forum state (here Colorado)?

4. If a default judgment was void for lack of personal jurisdiction, is that

voidness waived by a postjudgment "voluntary general appearance" seeking relief under Rule 60(b)(1) and (3), for fraud and mistake on the merits, from the Colorado District Court that rendered the judgment, after the defendant (a) has unsuccessfully sought relief on the ground of voidness, from the California District Court where the judgment was registered; and (b) has appealed the adverse ruling on voidness?

[Note: Petitioner reserves the right to argue the following Question 5, but does not include Question 5 among the reasons for granting certiorari.]

5. If out-of-state "place of abode" subtituted service was permitted, was it accomplished here, where (a) it was made on the defendant's estranged wife, after they had permanently separated and he was no longer actually living at her home; and (b) that service never reached him?

LIST OF PARTIES

The only parties to the proceeding in the Ninth Circuit Court of Appeals, and in the California District Court from which the appeal to the Ninth Circuit was taken, were those named in the caption of this Petition. They are Petitioner MASON H. ROSE, V and Respondent SUSAN T. FULTZ, a/k/a SUSAN THERESE FULTZ and SUSAN FULTZ-SMALL.

However, this action originated in the United States District Court for the District of Colorado, whose default judgment was registered in California. In addition to Petitioner, there were two other defendants in the Colorado District Court; both were dismissed at Respondent's request, at or before the entry of the default judgment. They were H. L. QUIST and H. L. QUIST MANAGEMENT AND DEVELOPMENT CORP.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MASON H. ROSE, V, Petitioner

v.

SUSAN T. FULTZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner MASON H. ROSE, V ("Rose") respectfully prays that a writ of certiorari issue to review the judgment and memorandum decision of the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal as moot and was entered on June 10, 1987.

OPINIONS BELOW

The Ninth Circuit's memorandum decision is unreported. It is reproduced, together with that Court's order denying rehearing, in Appendix C.

The order appealed from was the "Order After Contempt Hearing July 15, 1985", of the United States District Court for the Central District of California, where the Colorado District Court's default judgment had been registered. That order is unreported, and is reproduced in Appendix B.

The Colorado District Court's default judgment, and its "Findings of Fact and Order for Default Judgment", are unreported. They are reproduced in Appendix B.

JURISDICTION

Rose seeks review of the Ninth Circuit's memorandum decision, dismissing the appeal as moot; that memorandum was dated and entered June 10, 1987. A timely Petition for Rehearing was denied December 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

The principal provisions involved are (1) the Due Process Clause of the Fifth Amendment to the United States Constitution; (2) Rule 4 of the Federal Rules of Civil Procedure, relating to process, and in particular Rules 4(c)(2)(C) and (D), 4(d)(1), 4(e) and 4(f); (3) Official Form 18-A, the "notice and acknowledgment" referred to in Rule 4(c)(2)(C)(ii), and contained in the Appendix of Forms (to the Federal Rules of Civil Procedure); and (4) Rule 12 of the Federal Rules of Civil Procedure, relating to the presenting and waiver of defenses, and in particular Rules 12(b), (g) and (h). 1/

In addition, a Colorado statute and rule relating to process (Colo. Rev. Stat. sec. 13-1-125, and Colo. R. Civ. P. 4)

1/ References herein to a Rule or Rules, unless otherwise stated, are to Federal Rules of Civil Procedure.

could be relevant, if it is determined that state long-arm service was available after unsuccessful federal mail service.

In the aggregate, the above provisions are too voluminous to reproduce here, so they set forth separately, in Appendix A.

STATEMENT OF THE CASE

Although the present appeal was to the Ninth Circuit from the Central District of California, this case began as a diversity action in the District of Colorado, filed on November 10, 1983 by Respondent SUSAN T. FULTZ ("Fultz"). The jurisdiction of the Colorado District Court was invoked under 28 U.S.C. section 1332, plaintiff Fultz being a citizen of Colorado, defendant Rose a citizen of California, and two other defendants citizens of Arizona. On December 11, 1984, Fultz obtained a default judgment against Rose, from the Colorado District Court, for $464,753.

The jurisdiction of the California District Court was invoked under 28 U.S.C. section 1963, by Fultz' registration of her Colorado judgment in California.

A. Fultz' Attempts to Serve Process

Two attempts at service are relevant here. Fultz first attempted mail service under Rule 4(c)(2)(C)(ii), enclosing Form 18-A; Rose did not acknowledge service. Four days after the mailing, Fultz attempted substituted "place of abode" service on Rose's then wife. Both attempts were made in California (Rose's home state), for an action pending in the Colorado District Court. 2/

2/ The few simple and indisputable facts stated in this paragraph are sufficient to raise the first three of our Questions Presented and (we contend) to mandate a ruling that, as a matter of law, service of process was insufficient. However, additional facts are presented here in support of our contention that it was not only unlawful but unjust to base a default judgment on that service, and to trace the procedural history that compels a conclusion that the appeal is not moot.

Fultz' attempt at service by mail was made on February 16, 1984. On that date, she sent copies of the summons and complaint, and the other items provided for in Rule 4(c)(2)(C)(ii) (two copies of Form 18-A, and a stamped envelope), certified mail, return receipt requested, addressed to Rose at his office in California (CR 19, Ex. C at 2; CR 25, Rose Decln. at 2).

On February 21, 1984, the mailing arrived at Rose's office and was receipted for by the secretary of another attorney in Rose's suite (CR 25, Rose Decln. at 2-3). However, it did not reach Rose, and he was unaware of it, until several days after March 14, 1984, the date on which Rose returned to California from a six-week trial in Kentucky (Id. at 2-3). 3/

3/ The action was filed on November 10, 1983), so both the 120-day period after filing (Rule 4(j)) and the 20-day period after mailing (Rule 4(c)(2)(C)(ii)) had expired before the papers reached Rose.

Form 18-A led Rose to believe that as yet service had not been completed and he had no duty to defend, because he had not returned the acknowledgment, and he had not even received the papers within the 20-day period for return specified in the form (CR 25, Rose Decln. at 3). Form 18-A --particularly the paragraphs that began respectively "If you do not complete and return the form" and "If you do complete and return this form" (App. A at 7a)-- further led Rose to believe that, by not returning the acknowledgment, he only risked liability for the cost of service "in any other manner permitted by law", not a default judgment (Id. at 3-4). 4/

4/ We do not suggest that there was anything unusual in Rose's reading of Form 18-A, or in his belief that service had not been completed. On the contrary, we will show below that Rose's reading of the form was correct, and was the same as that of the Third Circuit, Fourth Circuit and D.C. Circuit Courts of Appeal.

Fultz' attempt at substituted "place of abode" service was made on February 20, 1984. On that date, according to the return of service executed by process server Ron Hughes, Rose was served "by substituting service on his wife . . . by leaving copies with her at place of residence which is 37 Crest Road West, Rolling Hills California (CR 19, Ex. B at 2; emphasis added). Hughes was "a private investigator and process server," employed by counsel for Fultz to serve Rose (CR 19, Ex. A at 1). He was not one of the class of persons (such as sheriffs) authorized by the Colorado Rules to serve process outside the state (Colo. R. Civ. P. 4(d)(2), App. A at 13a).

The papers served on Mrs. Rose never reached Rose, and he was not aware of the attempt at substituted service until some time after the default judgment (CR 25,

Rose Decln. at 4). [5/]

On the date of that service, February 20, 1984, Rose was no longer actually living at Mrs. Rose's residence. On that date, (1) he was living temporarily with Emma Faulk in Lexington, Kentucky (where he was engaged in a trial); and (2) his permanent home and usual place of abode was with Ms. Faulk at her home in Palos Verdes Peninsula, California.

B. The Colorado Default Judgment

Rose did not appear in the Colorado District Court at any time prior to the default judgment. On Fultz' motion, the

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[5/] There is conflicting evidence in the record as to whether Mrs. Rose was served at all; she denied having been served (CR 16, Mrs. Rose Decln. at 1-2; CR 25, Rose Decln. at 4). For purposes of this petition (as we did for the appeal below), we will assume that Mrs. Rose was served. On the other hand, there has been no evidence that the papers served on her ever reached Rose. Because of the hostility of their separation, it is unlikely that she would have delivered the papers to him or told him about them, and in fact she did not (CR 25, Rose Decln. at 4-6).

Colorado Court set a default hearing. As ordered by the Court, Fultz notified Rose of that hearing, and sent him copies of her filings for the hearing.

Rose still did not appear, and on December 11, 1984, the Colorado Court entered a default judgment against him, awarding Fultz about $465,000 (including $116,000 of compensatory damages, $148,000 of punitive damages,[6/] and a few hundred dollars in costs), based on claims of personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

Since he had not appeared in Colorado,

6/ In setting punitive damages at $348,000, the Colorado Court (App. B at 40a) "deem[ed] it necessary to forego the customary measure of such damages, and to adopt [the antitrust] standard of trebling the compensatory damages to Plaintiff in awarding punitive damages." But by setting the punitive damages alone at three times compensatory damages, the court awarded an overall judgment of four times compensatory damages, instead of three times as in antitrust.

Rose's jurisdictional contentions were not litigated there before judgment. Based solely on Fultz' representations, the Colorado court found she had served Rose by registered mail on February 16, 1984, and by substituted service on February 20, 1984 (Findings 3 and 2, App. B at 26a). However, in concluding service was proper, the court made specific reference only to the mail service Rule 4(c)(2)(C))(ii), as follows (Conclusion 1, App. B at 36a):

> 1. That service of process upon the Defendant Rose, in each instance, was proper and in full comportment with Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP.

C. The 7/15/85 California Ruling on Voidness, Rejecting Rose's Contention That He Was Not Properly Served

On January 17, 1985, Fultz registered her Colorado default judgment in the California District Court. She did so under 28 U.S.C. Section 1963, "by filing therein a certified copy of such judgment" (Rose's Excerpts of Record in Appeal No. 85-6202,

Item M 1, "Certification of Judgment for Registration in Another District"). [This detail should be superfluous, but the Ninth Circuit does not recognize that the appeal was from a registration proceeding, incorrectly stating (App. C at 45a-46a) that "Fultz filed an action in the [California] District Court . . . to enforce her Colorado judgment against Rose."] 7/

Rose's first appearance--in any court--in this litigation was in California on April 15, 1985. Beginning with that first appearance, and continuously thereafter until the California court rejected his jurisdictional objection, Rose made it clear that he was appearing only for the purpose of contesting jurisdiction. His

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7/ This is one of several incorrect statements of facts or dates in the Ninth Circuit's decision. Although these errors are probably of no major importance, we will state the facts accurately, and point out the error in brackets as we do here. If any of these differences should become material, the accuracy of our version can easily be verified from the record.

first words to the California Court were "Yes. Mason Rose specially appearing pro per." (4/15/85 RT at 4). His first written submission, that same day, was a "Special Appearance by Mason H. Rose, V to Object to This Court's Exercising Jurisdiction Over His Person" (CR 7). 8/

Rose followed that first submission nine days later with a more formal motion to set aside the Colorado judgment "for Lack of Personal Jurisdiction" (CR 16), which was denied in the order appealed from, on July 15, 1985 (App. B at 22a).

Rose's first appearance was a response to Fultz' attempt to cite him for contempt for failing to appear for a debtor deposition. The California court rejected the contempt citation, but ordered Rose to be deposed the next day (CR 8). Although he

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8/ Rose, like the Ninth Circuit, was not aware that the Federal Rules had abolished the age-old distinction between general and special appearances.

attended the deposition as ordered, Rose refused to answer questions other than on personal jurisdiction (CR 25 at 5-6).

As a result, Fultz filed a second contempt motion. Rose opposed it, on the ground that, because of improper service, the Colorado default judgment was void and both courts lacked jurisdiction, so he could not be punished for contempt of a void order.

In opposing contempt, Rose asserted both basic defects in service that he relies on here. First, although the mail service gave him notice of the Colorado action, Official Form 18-A told him he had not yet been served and had no duty to defend, because he did not return the acknowledgment (CR 25, Rose Decln. at 3-4). Second, Rose argued neither Federal Rules nor Colorado Rules permit out-of-state mailed or substituted service (CR 25 at 13-15; CR 27 at 3-8).

Although the California Court was reluctant to rule on the jurisdiction of the Colorado Court, at the contempt hearing both parties agreed to that determination (CR 25 at 10-13; CR 27 at 8; 7/15/85 RT at 6), which the California Court proceeded to make, albeit without any independent consideration of the issues.

At the hearing, the California Court said it was ruling there was jurisdiction in Colorado, "based on the finding of the Colorado Court," because "I don't think that this court should set aside judgments made by a sister court that has already looked at the issue that is involved in this hearing" (7/15/85 RT at 20, 22).

On July 15, 1985, in the order appealed from, the California Court (1) found Rose in contempt of the order for his deposition, and fined him; and (2) denied Rose's motion to set aside the Colorado judgment (App. B at 22a). Both of those rulings

were squarely based on the California Court's conclusions that service of process was proper and the Colorado Court had jurisdiction, as follows (App. B at 21a):

> 1. That substituted service of process upon a non-resident outside the boundaries of the State of Colorado is an authorized procedure under Colorado State statutes, rules and decisions.
>
> 2. That substituted service of process pursuant to Rule 4(d)(1) F.R.C.P. and Section 13-1-125 C.R.S. 1981 Supp. was valid and proper, thereby granting in personam jurisdiction over the Defendant Rose by the United States District Court, District of Colorado, Honorable Richard P. Matsch, Judge Presiding.
>
> 3. That in all respects the default judgment rendered against the Defendant Rose by the Colorado federal court was valid and proper.

On August 13, 1985, Rose filed a timely Notice of Appeal to the Ninth Circuit (CR 34), from the California Court's 7/15/85 order "in its entirety, including but not limited to those portions" that denied his motion to set aside the Colorado judgment, and found him in contempt.

Rose invoked the Ninth Circuit's jurisdiction under 28 U.S.C. Section 1291, asserting (Opening Brief at 5) the 7/15/85 order appealed from fully disposed of all claims, by denying his motion to set aside the Colorado judgment and finding him in contempt, both based on full and final rejection of his jurisdictional claims.

Thus Rose's objections to jurisdiction had been raised, ruled on adversely and appealed, months before he first appeared in Colorado on December 11, 1985. [9/]

[9/] Rose unsuccessfully sought reconsideration of the California ruling on jurisdiction, in a Rule 60 motion based on (1) Fultz' misrepresenting that the Colorado Court had considered, and based its ruling on, Colorado law; and (2) denial of due process by refusing to reconsider jurisdictional rulings made by the Colorado Court in Rose's absence. The California Court summarily denied Rose's motion by minute order (CR 49) on December 9, 1985 [not December 18, so Rose was not still "pursuing his Rule 60(b) motion in the California district court" (cf. App. C at 3) when he filed in Colorado 12/11/85]. That ruling, and the appeal from it, do not affect the questions presented here, so we will not discuss them further.

D. Rose's 12/11/85 Colorado Rule 60 Motion

On December 11, 1985, Rose filed a Rule 60 motion in the Colorado District Court. Rose's filings in Colorado were months after the 7/15/85 order appealed from here, so they are not part of the record in that appeal. However, those filings were properly placed before the Ninth Circuit by both parties in connection with Fultz' motion to dismiss the appeal as moot. 10/ See County of Dakota v. Glidden, 113 U.S. 222, 225 (1885) ("all courts are [compelled] to receive evidence dehors the record affecting their proceeding in a case before them on error or appeal").

10/ Those filings were the basis of the Ninth Circuit's decision that they constituted a "voluntary general appearance" by Rose in Colorado, thereby waiving improper service and mooting the Ninth Circuit appeal (App. C at 50a-52a). They are central to Rose's attack on the Ninth Circuit decision, and to his standing to continue his claim of improper service here. Accordingly, the Colorado Rule 60 motion in its entirety, and relevant excerpts from Rose's other Colorado filings, are set forth in Appendix D.

The caption and preamble of the motion (App. D at 55a-56a) specified the subdivisions of Rule 60 under which Rose sought relief from the default judgment--60(a) for clerical mistake, 60(b)(1) for mistake and 60(b)(3) for fraud and misrepresentation. Rose specified eleven numbered grounds for relief (App. D at 57a-68a), including two relating to service of process (Grounds 9 and 10, App. D at 66a-67a), Ground 11 relating to the facts of Fultz' claim, and the remainder relating to mistakes and misrepresentations as to punitive damages.

Rose's motion was primarily aimed at reducing or eliminating the $348,000 of punitive damages. To that end, he offered "to confess judgment for compensatory damages alone" (App. D at 69a; emphasis added) [the Ninth ciruit incorrectly called this a "confession of liability to compensatory damages" (App. C at 50a)]. It was an offer

to "waive all defenses and counterclaims against [Fultz]" (Rose 12/11/85 Affidavit at 3) and confess judgment for compensatory damages alone, thereby eliminating punitive damages entirely and settling the entire matter. When that offer was not accepted, and Fultz used it against him, Rose withdrew it. 11/

The Ninth Circuit (App. C at 50a) correctly states that "Rose informed the Colorado court that he was challenging the jurisdiction of that court to [the Ninth Circuit], . . ." However, Rose did much more than that. He provided the Colorado Court with the same evidence of defective

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11/ Since the filings that were submitted to the Ninth Circuit, the Colorado court has denied Rose's Rule 60 motion, and he has appealed it to the Tenth Circuit. Because the Ninth Circuit vacated the 7/15/85 California Order (App. C at 52a), it may now be possible for Rose to get a ruling on jurisdiction in Colorado. However, Rose contends he was entitled to that ruling in California, and that this Court should rule on it here.

service that he relies on here, in considerable detail (12/11/85 Rose Affidavit, App. D at 69a-77a). He asserted his "contention in . . . other proceedings that the default judgment is patently void for lack of personal jurisdiction over Rose, because there was no valid service of process" (App. D at 78a); he then proceeded to briefly summarize a primary legal basis for that contention, citing Federal Rule 4(f), two federal cases, a Colorado rule and two volumes of a Colorado text.

Rose further advised the Colorado Court that he was making his 60(b)(1) and (3) motions then, without waiting for a ruling on voidness, only because of the one-year limitation on motions under those subdivisions (App. D at 57a, 79a). The motions were filed on the last day of that one-year period.

In two of his three Colorado filings in December 1985, Rose made it clear that his

12/11/85 Colorado motion was intended to be in addition to, not instead of, his continued attacks on jurisdiction (App. D at 56a-57a, 78a). For example, Rose's 12/11/85 Brief said (App. D at 78):

> This motion is supplementary to two other proceedings, one pending and one contemplated within a few days, in which Rose asserts that the default judgment is void. The pending proceeding is an appeal to the Ninth Circuit Court of Appeals, from a contempt order of the California District Court where the judgment was registered. The contemplated proceeding is a motion to be made in this Court, under Rule 60(b)(4), to set aside the default judgment.

Rose did not file a 60(b)(4) motion in the Colorado court within a few days, as he had contemplated. Instead, he advised the Colorado Court (App. D at 81a-82a) that he was deferring that motion until after the ruling of the Ninth Circuit, "because further research convinced us that the only remedy to which we were entitled as of right was in pursuing the appeal that we had already filed in the

Ninth Circuit." 12/

Although Rose put the facts and a summary of the law relevant to jurisdiction before the Colorado Court in December 1985, it is true that he did not then ask the Colorado Court for a ruling that the default judgment was void for lack of jurisdiction. He did not do so then, because his research showed that he could not do so while the 7/15/85 California Order was still in effect.

E. The Ninth Circuit's Mootness Ruling

The Ninth Circuit's 6/10/87 Memorandum decision ("the Memorandum"; App. C at 43a-53a) vacated the 7/15/85 California Order and dismissed the appeal as moot.

12/ The details of that "further research" were not spelled out in Rose's Colorado brief. The research showed (as will be discussed in a later section) that in federal courts (unlike the rule in many states, including California) an order or judgment of a district court has res judicata or collateral estoppel effect even though it has been appealed, unless and until it is reversed or vacated.

The Ninth Circuit held that Rose's Rule 60 motion in Colorado was "a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction" (App. C at 50a; emphasis added). The Ninth Circuit continued (Id. at 50a-51a; emphasis added):

> Furthermore, Rose waived the defect of lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson [v. Hayakawa (9th Cir. 1982)], 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987)(general appearance by defendant failing to dispute personal jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Thus the Ninth Circuit held that Rose lost his right to appeal the 7/15/85 California Order, not because he failed to make timely objection to jurisdiction, but because he made a "voluntary general appearance" by failing to raise that issue

again in Colorado, after he had already raised it, lost it and appealed it in California.

F. Chronology Table

The following is a table showing the sequence of events that are central to the questions presented here:

11/10/83: Fultz files this diversity action, in the Colorado District Court.

2/16/84: Fultz mails process, including Official Form 18-A, to Rose's office in California, attempting service under Rule 4(c)(2)(C)(ii). The papers reached Rose about a month later, but he never returned the acknowledgment.

2/20/84: Fultz attempts substituted "place of abode" service on Rose's estranged wife, at the residence they had shared in California.

12/11/84: Fultz obtains default judgment against Rose in Colorado, for $465,000, including $348,000 of punitive damages.

1/17/85: Fultz registers her Colorado default judgment in the California District Court.

4/15/85: Rose appears for the first time, in California, appearing "specially" to contest jurisdiction, claiming improper service of process.

4/24/85: Rose files motion to set aside the Colorado judgment, in the California Court.

7/15/85: The California Court denies Rose's motion to set aside the Colorado judment, and finds him in contempt of a discovery order, both based on a ruling that service had been proper and the Colorado Court had jurisdiction.

8/13/85: Rose files a timely Notice of Appeal from the 7/15/85 California Order, to the Ninth Circuit Court of Appeals.

12/11/85: Rose appears for the first time in the Colorado District Court, filing a Rule 60 motion, asking for relief from the default judgment under Rules 60(a), 60(b)(1) and 60(b)(3). He presents evidence of improper service to the Colorado Court, and advises that Court of his challenge to jurisdiction in California, but he does not ask the Colorado Court for a ruling on his jurisdictional challenge.

6/10/87: The Ninth Circuit dismisses Rose's appeal from the 7/15/85 California Order as moot, and vacates the order, ruling that Rose made a "voluntary general appearance" in Colorado by not challenging jurisdiction again in Colorado when he made his Rule 60 motion.

12/17/87: The Ninth Circuit denies Rose's timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

This case is an urgently-needed opportunity for the Supreme Court to answer three major questions on service of process that have divided the federal courts. Those questions relate to unacknowledged mail service, out-of-state mail service, and the availability of state methods of service after unsuccessful federal mail service.

The 1983 amendments to Rule 4 achieved their goal of reducing the workload of the United States Marshals. However, they failed in their other primary objective, which was to provide an inexpensive, simple and easy-to-prove sērvice by mail, as an alternative to personal service. Instead, too often the result has been conflict and confusion.

Because of the conflicts among the circuits, whether service has been completed depends on which circuit's law controls.

The confusion may be even worse where the circuit's court of appeals has not yet spoken and a district court is free to choose for itself. In one horrible example (there are others), two courts of the same district reached opposite conclusions in the same month. Compare Zisman v. Sieger, 106 F.R.D. 194, 200 (N.D. Ill. 1985) with Excalibur Oil, Inc. v. Gable, 105 F.R.D. 543, 545 n. 5 (N.D. Ill. 1985).

In an alarming number of cases, the parties cannot know whether service has been completed until it is too late, and they must blindly make critical decisions at their peril. A wrong choice can risk dismissal for a plaintiff, or (as here) default for a defendant.

Some commentators say the situation is hopeless, and cannot be resolved without further amendments to the rules. See, e.g., Davies, Report on Service of Process by Mail, 116 F.R.D. 169, 178 (1987):

> Yet contrary to that purpose [of the Federal Rules, "to secure the just, speedy, and inexpensive determination of every action"], and to the intended uniformity of practice under the Federal Rules, that same mail provision, fraught with ambiguities, has itself generated much litigation and many conflicts among district, and even circuit, courts. Since neither a consensus among the federal courts nor consideration by the Supreme Court of these problems would appear likely, they must be remedied by amendments to the Rules themselves. 13/

On the other hand, according to 4A C. Wright and A. Miller, Federal Practice and Procedure: Civil 2d Section 1092.1 (1987), "Service under the new provision [for service by mail] should present few problems." Mail service should present few problems, but Supreme Court guidance is needed before that ideal becomes reality.

13/ See also Sinclair, Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c), 73 Va. L. Rev. 1183 (1987); Jarvis and Mellman, Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure: From Hapless to Hopeless, 61 St. John's L. Rev. 1 (1986); Crowley, Rule 4: Service by Mail May Cost You More Than a Stamp, 61 Ind. L. J. 217 (1986).

The present uncertainty might be less objectionable on a more esoteric issue. On an issue as all-pervasive as service of process, that uncertainty is intolerable.

A. Review is Needed to Resolve the Conflict Among Circuits on the Question of Unacknowledged Service by Mail.

1. There Is Conflict Among the Circuits.

The is an apparently irreconcilable conflict among the circuit courts of appeals as to whether mail service under Rule 4(c)(2)(C)(ii) is effective even without acknowledgment. A majority, made up of the Third, Fourth, Fifth, Sixth and D.C. Circuits, concludes unacknowledged service is not effective. A minority of one or two--the Second, and perhaps the Tenth--hold that it is effective. We here list relevant cases, by circuit.

Second Circuit: Morse v. Elmira Country Club, 752 F.2d 35, 39 (2d Cir. 1984) was a statute of limitations case, but nevertheless is a square holding that Rule 4 mail

service is effective on receipt, whether or not it is acknowledged. According to Morse, the second personal service provided for in the rule is not needed to complete or substitute for the mailed service, but only to enable the plaintiff to make proof of service.

Third Circuit: Stranahan Gear Co., Inc. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986) expressly disagreed with the Second Circuit in Morse, and chose to follow the Fourth Circuit in Armco, concluding that "If an acknowledgment is not returned, the formal requirements of mail service are not met and resort must be had to personal service." In Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 879-82 (3d Cir. 1987), the Third Circuit again disagreed with Morse, concluding personal service is required to effectuate federal mail service if defendant fails to acknowledge within the designated time.

Fourth Circuit: Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1088-89 (4th Cir. 1984) held a default judgment based on unacknowledged mail service was void, as the effectiveness of federal mail service is dependent on an appropriate response by defendant on the Notice and Acknowledgment Form 18-A.

Fifth Circuit: Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728, 730 (5th Cir. 1985) held that "Rule 4(c)(2)(C)(ii) is an integrated procedure for establishing and proving in personam jurisdiction as well as service of process, and defendant's return and acknowledgment are an essential part of that procedure.

Sixth Circuit: United States v. Gluklik, 801 F.2d 834, 836-37 (6th Cir. 1986) says the courts, consistent with the legislative history, "have held that the defendant's failure to acknowledge service renders such service invalid, . . ." (listing

citations, with a "But see" citation of Morse). However, Gluklik holds the service was valid because the defendants had agreed to accept it in return for vacating the default judgment.

Tenth Circuit: Kitchens v. Bryan County National Bank, 825 F.2d 248, 255-56 (10th Cir. 1987) seems to say that service was proper under Rule 4(c)(2)(C)(ii), even though no notice and acknowledgement or return envelope was included; it is not clear from the opinion whether that is a dictum or an alternative holding to the main holding that Oklahoma law was complied with. Kitchens does say that the service complied with the spirit, if not the letter of Rule 4, and that "'the federal courts generally take a permissive attitude towards the mechanism employed for service when defendant actually receives notice.'"

D.C. Circuit: Combs v. Nick Garin Trucking, 825 F.2d 437, 443-48 (D.C. Cir. 1987) reversed a default judgment as void, expressly disagreeing with the Second Circuit in Morse, and joining "with the Third and Fourth Circuits in holding that if a plaintiff elects to utilize the federal mail service rule and the defendant does not return the acknowledgment within the designated period, the mailing cannot stand as effective service of process simply by treating it as made in accordance with a state-law method that otherwise might be available." [Omitted footnotes cite Stranahan and Armco].

These cases establish that there is a conflict, and the most recent of them correctly concludes that:

> [T]hese decisions cannot be squared; they reflect antithetical readings of Rule 4(c)(2)(C)(ii), and we must consider each carefully before making any choice between them. Combs, 825 F.2d at 446.

The Supreme Court should make that choice.

2. Notice of the Action Is Not Enough; the Defendant Must Also Be Notified That He Has Been Served and Brought Into Court.

There is an unfortunate tendency to refer to notice of the action as the purpose of service of process. That overlooks a second essential element of proper service--the assertion of jurisdiction.

> The primary function of Rule 4 is to provide the mechanisms for bringing notice of the commencement of an action and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. 4 C. Wright & A. Miller, Federal Practice and Procedure (1969) Section 1063; emphasis added.

This second function was recognized recently in Omni Capital International v. Rudolf Wolff & Co., Ltd., ___ U.S. ___, 108 S.Ct. 404, 409 (1987):

> "[S]ervice of process is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."

There is much less ritual and formality in service today, but it is still essential to let the defendant know that he is

being brought into court, as well as that the action has been commenced.

A leading case frequently cited for liberal construction in finding proper service is Rovinski v. Rowe, 131 F.2d 687, 689 (6th Cir. 1942). That opinion quoted with approval from the district court's statements that "the question of service must be resolved by 'what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint'", and its analysis in terms of "a person knowing that he has been asked to come into court to answer to some complaint against him for damages."

Thus even under the liberal construction that prevails under the Federal Rules, it is still essential that the defendant be notified that he is being served, so he will know that he has been brought into court.

3. Form 18-A tells a defendant he has not been served if he does not return it, so an ensuing default judgment is fundamentally unfair.

Instead of telling the defendant that he has already been served and brought into court, whether or not he acknowleges service, Official Form 18-A tells him just the opposite, in these two paragraphs (App. A at 7a):

> If you do not complete and return the form to the sender within 20 days, you . . . may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.
>
> If you do complete and return this form, you . . . must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Thus Form 18-A tells a defendant he has two choices. He can return the acknowledgment, but if he does he must answer the complaint within 20 days or face a default judgment. His other choice is not to acknowledge service, in which case he may be

required to pay for another attempt at service, but he does not risk a default judment.

In the courts below, Fultz has accused Rose of misreading Form 18-A. However, it is Fultz who has misread the form. So far as we are aware, every court that has considered this issue has interpreted the form to mean what it did to Rose. We set forth here the interpretations of the three courts of appeal that have done so.

According to Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1089 (4th Cir. 1984):

> [T]he notice [Form 18-A] told them that they need do nothing if they did not accept and acknowledge service, though they might be required to pay the cost of service by some other means.

According to Green v. Humphrey Elevator and Truck Co., 816 F.2d 877, 882 (3d Cir. 1987) (emphasis in original):

> Rule 4(c)(2)(C)(ii) expressly incorporates, for the purpose of defendant

> acknowledgment of receipt, official Form 18-A. That form, in turn advises the defendant that the only consequence of failing to return the acknowledgment form is that s/he may be required to pay the expense of alternative service.

The most recent and most detailed explanation is that of Combs v. Nick Garin Trucking, 825 F.2d 437, 443-44 (D.C. Cir. 1987) (footnotes omitted; emphasis in original):

> The unmistakable meaning of this provision [the second sentence of Rule 4(c)(2)(C)(ii)] is that if a defendant does not return the notice of acknowledgment, the plaintiff must make a second attempt to secure service on that defendant if he is to be further pursued in the litigation.
>
> This reading is bolstered by two factors. . . . Second, only this reading of subdivision (ii) is consistent with the text of the form that must be sent to defendants when federal mail service is undertaken. The form warns defendants that failure to return an acknowledgment may result in liability for the cost of alternative service, again without so much as a hint that such failure could expose the defendant to default or default judgment. Indeed, the form indicates plainly enough that the only course of conduct which might give rise to judgment by default is the failure to file an answer within twenty days after returning the form.

Nor is there any conflict with Morse on this interpretation of Form 18-A. Although Morse conflicts with all three ciruits just quoted on the effectiveness of unacknowledged service, in Morse the Second Circuit was not required to interpret Form 18-A because of a typing error.

> By what appears to be a transcription error, plaintiff's form reads: "If you do not complete and return this form . . . ." We are very reluctant to nonsuit a plaintiff for so minor and obviously incorrect a deviation. Rule 4(c)(2)(C)(ii) supports this conclusion, since it requires only substantial compliance with the form, and not an absolutely perfect rendering. Moreover, plaintiff's error should have made defendant more alert than would the version contained in the form; this is not a case in which a deviation from the form lulled the recipient into inaction. . . . This single, minor, apparently unintentional deviation, which had no significant impact on defendant's conduct, is not ground for voiding the mail service. Morse, 752 F.2d at 41-42 (emphasis in original).

By contrast, the correct Form 18-A does lull the recipient into inaction, and it did so here. For the courts to deceive a defendant, by awarding a default judgment

against him after leading him to believe he has not been served, is so fundamentally unfair as to deny due process of law. It is equally unfair to use the "actual notice" of the mail service (as Fultz did successfully in the California District Court) to validate a substituted service that never reached Rose.

B. Review is Needed to Resolve Conflicts Among Federal Courts, With Each Other and With the Recent Omni Decision of This Court, on Out-of State Service.

Both the Colorado and California District Courts relied on Federal Rule 4 service (instead of or in addition to Colorado long-arm service) to validate Fultz' attempts to serve Rose in California for a diversity action in Colorado.

The Colorado Court concluded service was proper under "Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP" (App. B at 36a). The California Court concluded that Fultz' substituted service satisfied both "Rule 4(d)(1) F.R.C.P. and [Colorado]

Section 13-1-125 C.R.S. 1981 Supp." (App. B at 21a)

Both Courts ignored the problem of out-of-state service under Federal Rule 4. That question has divided federal courts since the 1983 amendments, but hopefully it has been answered now--against Fultz--by this Court's decision in Omni Capital International v. Rudolf Wolff & Co., Ltd., ___ U.S. ___, 108 S.Ct. 404 (1987). We say "hopefully" because Omni arose under a federal statute, and it may be necessary for this Court to establish here that the same principles apply to diversity actions.

We will only briefly refer to the pre-Omni situation. It had been established that out-of-state [illegible]uted service was not available under Fed.R.Civ.P. 4(d)(1). Davis v. Musler, 713 F.2d 913 (2d Cir. 1983) ("When read in light of Rule 4(f), it is clear that Rule 4(d)(1) applies only

when a complaint is served within the territorial limits of the state in which the district court where the action is pending sits.").

However, the situation was muddled on the availability of out-of-state mail service under Rule 4(c)(2)(C)(ii). There were plenty of decisions, and most held it was not available, but virtually all of them were district court decisions, so a definitive answer was not possible. As pointed out in M. Davies, Report on Service of Process by Mail, 116 F.R.D. 169, 171 (1987):

> [T]he majority of courts which have addressed the issue have held that, where state law is relied upon to permit extraterritorial service, mail service under Rule 4(c)(2)(C)(ii) is not available; a state method of service must be used. However, other courts have held to the contrary. This dispute has taken on added importance since a decision by one court, . . . that the improper use of mail service to serve a defendant out of state precludes that plaintiff from ever obtaining effective service out of state. [Footnotes omitted; emphasis in original].

The 1983 amendments to Rule 4 were enacted by Congress, which had rejected changes submitted to it by the Supreme Court. See, e.g., id., 116 F.R.D. at 169-70. The same principles should apply to this enactment of Congress as to the federal statute in Omni (of course, principles of interpretation do not depend on the enacting body, so it should not matter whether the amendments were written by Congress or the Supreme Court).

Service of process in federal actions is covered generally by Rule 4. Omni, 108 S.Ct. at 409. Rule 4(f) describes where it may be served, authorizing service in the state where the action is brought, or anywhere else authorized by a federal statute or by the Rules. Id. at 410. In diversity actions, that limits the search to the Rules, and the obvious reference is to Rule 4(e). In the absence of a federal statute (as here), that means resort must

be had to the state long-arm statute. Cf. Ibid.

Thus out-of-state service is not available under Rule 4(c)(2)(C) or 4(d)(1), except as expressly provided in subdivision (i) of Rule 4(c)(2)(C). That excludes mail service under 4(c)(2)(C)(ii). The drafters of the rule knew how to authorize nationwide service when they wanted to provide for it. Cf. Id. at 411. The courts are not free to fill in the gaps. Cf. Id. at 412-13.

Perhaps the federal courts will perceive the connection, between Omni and the problem of nationwide mail service, without further guidance from the Supreme Court. If so, it might be sufficient to dispose of this case summarily, to bring it into line with Omni. However, we strongly urge guidance from this Court now, particularly since it overlaps the troublesome question we address next.

C. Review is Needed to Resolve the Conflict Among Circuits on the Availability of Long-Arm or Federal Out-of-State Service After Federal Mail Service Has Failed.

Here we are faced with irreconcilable conflicts on two levels. First, is state long-arm service available after mail service is unsuccessful? Second, is federal out-of-state Rule 4(d) service available in that situation?

On the first question, there is a conflict among the circuits, in their interpretation of the second sentence of Rule 4(c)(2)(C)(ii), which provides (App. A at 2a-3a; emphasis added):

> If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

In Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1089 (4th Cir. 1984), the Fourth Circuit held that:

> Once service is attempted under Rule 4(c)(2)(C)(ii), service of process in accordance with state law, as otherwise authorized by 4(c)(2)(C)(i), is not permissible.

In Humana, Inc. v. Jacobson, 804 F.2d 1390, 1393 (5th Cir. 1986), the Fifth Circuit expressly disagreed with the Fourth Circuit in Armco, and applied the reasoning of the Second Circuit in Morse. Humana refused to interpret literally the word "shall" (emphasized above in our quotation of the second sentence of subdivision (ii)), and proceeded to hold that a second mail service in accordance with state law was valid despite plaintiff's initial reliance on federal mail service.

In Combs v. Nick Garin Trucking, 825 F.2d 437, 445 n. 76 and 77 (D.C. Cir. 1987), the D.C. Circuit described the conflict and disagreed with the Fifth Circuit in Humana, but distinguished Humana (825 F.2d at 444 n. 55), because "The mode of a

in Humana, but distinguished Humana (825 F2d at 444 n. 55), because "The mode of a second effort to effect service is unimportant here, since there was no subsequent attempt to serve."

This question is particularly troubling to the courts, because it is difficult to perceive a logical reason for the mandatory "shall" that (if taken literally) precludes one of the two alternatives that were originally available. See, e.g., Combs, 825 F.2d at 437 n. 98:

> While the rule, by its terms, clearly calls for personal service following a failed attempt to utilize federal mail service, . . . we confess to some uncertainty as to why Congress desired to foreclose otherwise permissible methods of service merely because the plaintiff initially elected to use the federal rule.

Obviously, there is a strong temptation to fill in the gaps, something which the Supreme Court forbade (albeit in a different context) in Omni. That temptation becomes almost irresistible in another case

of failed mail service, where (as is the case here, and as it often is) the defendant is out of state and the only alternative to mail service is state long-arm service.

In at least one such instance, it was held that the improper use of mail service precludes that plaintiff from ever serving effectively out of state. Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 110 F.R.D. 4 (S.D. W.Va. 1985).

A more common result in that situation is to permit the out-of-state service under the Federal Rules. See, e.g. McDougald v. Jenson, 786 F.2d 1465, 1487 (11th Cir. 1986), cert denied 107 S.Ct. 207 (1986). But that ignores the territorial limitations of federal service, and now conflicts with this Court's Omni decision, as it did previously with the Second Circuit in Davis v. Musler, 713 F.2d 907, 913 (2d Cir. 1983).

A more sensible solution to this knotty problem was that of the Rhode Island District Court in an opinion that is not yet published, Pascalides v. Irwin Yacht and Marine Corp., 1988 U.S. Dist. LEXIS 64 (D. R.I. 1988). The Rhode Island Court noted (at 6) that "The Circuit Courts do not agree on [the question of state long-arm service after unsuccessful mail service]", proceeded to discuss the conflict, and then (at 7-8) described its own solution, already announced at a previous hearing:

> To avoid any confusion due to the second sentence of (C)(ii), . . . the Court determined that the first attempted service was completely invalid and that Irwin North was then free to make a fresh start at [state long-arm service] under 4(c)(2)(C)(i).

Although the Rhode Island service is not the most favorable to Rose (we would prefer a holding that Fultz was precluded from ever making proper out-of-state service), it seems to make sense. By first attempting federal mail service, Fultz in

effect shot an unloaded gun. It could not be effective in any event, so perhaps she should not be penalized for having chosen an option that was not open to her.

Furthermore, we are confident that Fultz has not yet satisfied the requirements for proper Colorado long-arm service. Out-of-state mail service is not available for a Colorado in personam action, and out-of-state substituted service is not available either. Colorado Rule 4(f)(1) governs out-of-state service here, and plainly requires delivery "to the person served" (App. A at 15a). At least four different Colorado commentators have unequivocally stated that this language precludes the substituted service that is available within Colorado under Colorado Rule 4(e)(1) (App. A at 14a).

We are not aware of any contrary authority. In the courts below, Fultz relied on a Colorado case that did not consider

the question (finding the service improper on other grounds), and an out-of-state case based on a similar long-arm jurisdiction statute, but a completely dissimilar service of process statute.

D. Review is Needed to Resolve the Conflict Between the Ninth Circuit and Other Circuits, on the Waiver of Jurisdictional Defects by "General Appearances" Not Covered in Rule 12.

The Ninth Circuit's decision (App. C at 43) is part of an unfortunate recent trend in that circuit, away from waiver analysis based on Rule 12, and back to the age-old distinction between general and special appearances.

We are not aware of any Supreme Court decision on the issue, but for decades the circuits (including the Ninth, until a few years ago) have recognized that the Federal Rules abolished that distinction.

After 50 years, it is time for the Supreme Court to speak, and to establish that the defenses specified in Rule 12

(such as the insufficiency of service of process relied on here by Rose) can be waived only as provided in Rule 12.

The Federal courts should not be permitted to develop a common law of waiver of lack of jurisdiction, any more than they are permitted to develop a common law of service of process. Just as Rule 4 spells out the rules of service, Rule 12 spells out the rules for the waiver of the defenses specified there.

Since the leading case of Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), it has been established that "Rule 12 has abolished for federal courts the age-old distinction between general and special appearances."

2A Moore's Federal Practice (1986) paragraph 12.12 quotes that sentence from Orange Theatre, stating that "Special appearances are no longer necessary," [citing decisions from the Ninth Circuit and

five other circuit courts of appeals], and that "An appearance does not waive the objection of lack of jurisdiction over the person."

The decision here is not rendered harmless by the fact it is not to be published. It cites two published Ninth Circuit opinions, both of which also used a "general appearance" analysis.

Nor is there any guarantee that the aberration here can be confined to the Ninth Circuit. For a similar "analysis," see Broadcast Music, Inc. v. M.T.S. Enterprises, 811 F.2d 278, 281 (5th Cir. 1987). There the Fifth Circuit (as the Ninth Circuit does here) relied on a quotation from a Corpus Juris Secundum definitition of "Appearance", failing to recognize that that term can have different meanings in different contexts. See Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1546 n. 6 (D.C. Cir. 1987).

Here Rose's fatal error was in filing a postjudgment Rule 60 motion, without again raising in Colorado the jurisdictional cliam that he had already raised and lost in California. Under federal law of res judicata and collateral estoppel, Rose could not raise that issue again in Colorado, according to 1B Moore's Federal Practice (1984) paragraph 0.416[3]:

> The federal rlule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel, . . . [T]he judgment . . . is entitled to collateral estoppel effect, until reversed, vacated or modified. [Footnotes omitted].

Furthermore, Rose had to make his Rule 60 motion in Colorado when he did, which was on the last day of the one-year period specified for motions under 60(b)(1) and 60(b)(3).

Even under the pre-rules common law, our motion would not have waived jurisdiction. In Harkness v. Hyde, 98 U.S. 476,

479 (1878), as here, service had been made outside the jurisdiction of the trial court. It was held that the jurisdictional challenge was not lost by appearing specially to raise it, but then answering to the merits after the challenge had been erroneously overruled. If answering and defending the full case on the merits did not waive the challenge, then a fortiori our post-judgment Rule 60 motion did not do so either.

The decision here fails to recognize that this is a registration proceeding, so it does not even discuss the two-court problem inherent in that situation. It merely fashions a rule that jurisdiction must be challenged again in a second court, from cases that were not two-court cases at all.

Even if Rose's Colorado appearance waived his objections to jurisdiction, it does not necessarily moot the appeal.

If the waiver was not retroactive, the judgment is still void, and the Ninth Circuit should have reversed the contempt order and granted the motion to set the judgment aside. If the waiver was retroactive, the Ninth Circuit should have affirmed both orders of the California court.

But the retroactive waiver of a void judgment, by a postjudgment "general appearance", would violate due process. We are not aware of any federal law on that question, but a California court spoke eloquently, in In re Marriage of Smith, 135 Cal.App.3d 543, 549-50 (1982) (footnotes omitted):

> [The doctrine of "retroactive waiver" is] as fine an example as possible of . . . how unreflecting use of legal concepts leads to unintended results. The rule began as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a "general appearance," depriving unwary defendants ofl "'The fundamental requisite of due process of law .. the opportunity to be heard.'"

Rose's Colorado motion was not among the waiver situations listed in Rule 12. He has never filed a responsive pleading in any court, nor (except for his jurisdictional challenges) has he ever made any of the other motions listed in Rule 12.

The appeal is not moot.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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March 16, 1988

87-1559

Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1988

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APPENDIX A: CONSTITUTIONAL PROVISION, RULES AND STATUTE INVOLVED

A. UNITED STATES CONSTITUTION

Fifth Amendment, Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

B. FEDERAL RULES OF CIVIL PROCEDURE [1/]

1. Rule 4

Rule 4. Process.

. . . .

(c) SERVICE.

. . . .

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by

---

[1/] The rules set forth in this appendix are the present rules, as reprinted in J. Moore, Moore's Federal Practice, Federal Civil Rules 1988, pt. I at 30-34, 127-29, 675, 886-87 (1988). There have been minor changes since service was attempted here, made by 1987 Amendments to Rules 4, 12 and 60, and a 1985 Amendment to Form 18-A. The changes were technical (id. at 47, 134, 684, 889-90) and do not affect this litigation.

any person who is not a party and is not less than 18 years of age.

. . . .

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subparagraph (d) of this rule--

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this

subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

. . . .

(d) SUMMONS AND COMPLAINT: PERSON TO BE SERVED. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

. . . .

(e) SUMMONS: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by

the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . .

2. Appendix of Forms, Form 18-A
(referred to in Rule 4(c)(2)(C)(ii))

Form 18-A.--NOTICE AND ACKNOWLEDGMENT
FOR SERVICE BY MAIL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK [2/]

Civil Action, File Number _____

A.B., Plaintiff	
v.	Notice and Acknowledgment of Receipt of Summons and Complaint
C.D., Defendant	

NOTICE

To: (insert the name and address of the person to be served).

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

[2/] Of course, the district of the issuing court (here the District of Colorado) is to be substituted for the Southern District of New York.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the person on whose behalf your are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

_____
Signature

_____
Date of Signature

ACKNOWLEDGMENT OF RECEIPT
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

_____
Signature

_____
Relationship to Entity/
Authority to Receive
Service of Process

3. Rule 12

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any

pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

. . . .

(g) CONSOLIDATION OF DEFENSES IN MOTION. A party who makes a motion under this rule may join with it any other

motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

4. Rule 60

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void;

. . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

C. COLORADO STATUTE AND RULE [3/]

1. Colorado Revised Statutes, Section 13-1-125.

13-1-125. Service of Process. (1) Service of process upon any person subject to the jurisdiction of the courts of Colorado may be made by personally serving the summons upon the defendant or respondent outside this state, in the manner prescribed by the Colorado rules of civil procedure, with the same force and effect

---

[3/] This Colorado statute and rule would become relevant if it is determined that state long-arm service was available after an unsuccessful attempt at mail service under Federal Rule 4(c)(2)(C)(ii).

as if the summons had been personally served within the state.

2. Colorado Rules of Civil Procedure, Rule 4.

Rule 4. Process.

. . . .

(d) By whom served. Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of eighteen years, not a party to the action;

(2) At any other place by a sheriff, deputy sheriff, constable, deputy constable, bailiff, deputy bailiff, or other officer having like powers and duties of the political subdivision in which the service is made or an officer authorized by the laws of this state to take acknowledgements in such political subdivision to deeds conveying real estate situate in this state or an

attorney, counselor at law, solicitor, advocate, barrister duly qualified to practice law in such political subdivision or a person specially commissioned to serve process by the court in which the action is pending.

(e) Personal Service in State. Personal service within the state shall be as follows:

(1) Upon a natural person over the age of eighteen years by delivering a copy or copies thereof to him personally, or by leaving a copy or copies thereof at his dwelling house or usual place of abode, with some member of his family over the age of eighteen years, or at his usual place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process;

. . . .

(f) Personal Service Outside the State. Personal service outside the state may be made:

(1) In any action, upon a natural person over the age of eighteen years who is a resident of this state, or who is a nonresident of this state and who has submitted to or has become subject by law to the jurisdiction of the courts of this state, by delivering a copy of the process, together with a copy of the pleading upon which it was issued, to the person served;

. . . .

(g) Other Service. Service by mail or publication shall be allowed only in cases affecting specific property or status or other proceedings in rem.

. . . .

APPENDIX B:
ORDER, FINDINGS, CONCLUSIONS AND JUDGMENT OF CALIFORNIA AND COLORADO DISTRICT COURTS

A. The Order Appealed from to the Ninth Circuit: "Order After Contempt Hearing July 15, 1985," filed July 15, 1985, in the California District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. MISC 15142
CV-85-1854-TJH (Bx)

SUSAN THERESE FULTZ a/k/a SUSAN FULTZ-SMALL
Plaintiff
vs
MASON H. ROSE, V
Defendant

ORDER AFTER CONTEMPT HEARING JULY 15, 1985
[Filed July 15, 1985]

THIS MATTER having come regularly before the Court on July 15, 1985, upon the Plaintiff's Order to Show Cause: Citation for Contempt (Second) directed to the Defendant Mason H. Rose, V. At the hearing conducted herein, Plaintiff was represented by Messrs. James A. Beckwith and Joseph Ferrante, and Defendant Mason H. Rose, V was represented by Mr. James M. Weinberg.

After consideration of the arguments of counsel and the affidavits filed herein, together with the pleadings and memoranda of law, the Court

MAKES THE FOLLOWING FINDINGS OF FACT:

1. That on November 10, 1983, Plaintiff filed the within action in the United States District Court, District of Colorado.

2. That on February 20, 1984, service of process was made upon Defendant's wife, Wynonah D. Rose, at 37 Crest Road West, Rolling Hills, California, within the County of Los Angeles.

3. That on February 20, 1984, the address of 37 Crest Road West, Rolling Hills, California, was Defendant's usual place of abode inasmuch as Defendant's registered mailing address, registered voting address, and personal business address were voluntarily listed as such by the Defendant at the time substituted service was performed.

4. That between November, 1983, and March, 1984, the Defendant was absent from the Rolling Hills address on personal and professional business. Despite such temporary absences, however, the Defendant Rose continued to maintain a reasonable and substantial nexus to 37 Crest Road West sufficient to satisfy Rule 4(d)(1), F.R.C.P.

5. That on February 21, 1984, the Defendant Rose received at his law offices, located at 4010 Palos Verdes Drive North, Rolling Hills Estates, California, a registered, return receipt letter containing the Notice of Suit required under Rule 4(c)(2)(c), together with a copy of the summons and complaint in the pending Colorado action.

6. That the Defendant Rose personally read and had knowledge of the summons and complaint, having received from his office staff the mailed documents described in Paragraph 5 above.

7. That between April and December 10, 1984, the Defendant Rose received from Plaintiff copies of all motions and pleadings directed toward the request for and ultimate entry of default judgment against him by the Colorado federal court.

8. That in response to all notices, summons and complaints, the Defendant Rose voluntarily and knowingly failed and refused to take any action by himself or through counsel with respect to the pending Colorado suit against him.

9. That on April 15, 1985, Defendant Rose voluntarily appeared before this Court in response to an Order to Show Cause compelling his appearance. That, at that time and place the Defendant was directed by this Court to appear on April 16, 1985, at the offices of Plaintiff's California counsel to give his deposition as requested by Plaintiff.

10. That on April 15, 1985, the Defendant received, by service upon his legal

offices, notice of the date, time, place and personal requirements placed upon him by this Court's directive.

11. That on April 16, 1985, the Defendant voluntarily chose to obey the Court's Order by appearing for his deposition. However, in spite of the clear language in its written Order, he refused to be sworn and answer questions upon his deposition.

12. That such acts as committed by the Defendant Rose on April 16, 1985, were knowingly and willfully in violation of this Court's Order and therefore contemptuous of the power and dignity of this Court.

13. That Plaintiff has suffered unnecessary and increased costs, expenses and attorney fees as a direct result of Defendant's contempt, all in the sum of $5000.00.

14. That Defendant Rose has not asserted any ground for relief from judgment

except the alleged invalidity of the Colorado judgment due to defective service of process.

AND MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That substituted service of process upon a non-resident outside the boundaries of the State of Colorado is an authorized procedure under Colorado State statutes, rules and decisions.

2. That substituted service of process pursuant to Rule 4(d)(1) F.R.C.P. and Section 13-1-125 C.R.S. 1981 Supp. was valid and proper, thereby granting in personam jurisdiction over the Defendant Rose by the United States District Court, District of Colorado, Honorable Richard P. Matsch, Judge Presiding.

3. That in all respects the default judgment rendered against the Defendant Rose by the Colorado federal court was valid and proper.

AND THEREFORE ORDERS:

1. That the Defendant's Motion to Set Aside Judgment is hereby denied and dismissed;

2. That the Stay on Writs of Execution previously entered by this Court is hereby vacated forthwith;

3. That the United States Marshall is hereby directed to forthwith proceed with the publication and conduct of the sale of all real and personal property heretofore levied upon and to make return of all proceeds of sale in accordance with law;

4. That the Defendant Mason H. Rose, V shall forthwith pay and deliver unto Plaintiff the sum of $5,000.00, as damages suffered by the Defendant's contempt;

5. That the Defendant Mason H. Rose, V shall forthwith pay to the Clerk of the Court the sum of $500.00, as a financial penalty for his contempt of the dignity and integrity of this Court; and

6. [Deleted.]

ORDERED AND SIGNED in open Court this 15 day of July, 1985.

BY THE COURT:

/s/
Honorable Terry J. Hatter
Judge Presiding

B. Judgment, entered December 11, 1984, in the Colorado District Court (and registered by filing January 17, 1985, in the California District Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

SUSAN THERESE FULTZ
a/k/a SUSAN FULTZ-SMALL,
Plaintiff,

v.

MASON H. ROSE, V., H.L. QUIST, and H.L. QUIST MANAGEMENT AND DEVELOPMENT CORPORATION,
Defendants.

JUDGMENT
[Entered December 11, 1984]

Pursuant to and in accordance with the Findings of Fact and Order for Default Judgment, entered by the Honorable Richard

P. Matsch, Judge, signed and filed on December 11, 1984, and it is

ORDERED, that judgment is entered in favor of the plaintiff and against the defendant Mason H. Rose, V., and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., compensatory damages in the amount of $106,128.34 which includes 15% interest per annum on the unpaid lease value to the date of this judgment; attorney's fees in the amount of $9,917.19 pursuant to the Equipment Lease Agreement for a total compensatory damages of $116,045.53, and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., punitive damages in the amount of $348,136.59 plus court costs, as determined by the Local Rule 105, in the amount of $570.50 for a total judgment of $464,752.62 which sum shall bear interest

at the rate of 9.5% from the date of the entry of this judgment, and it is

FURTHER ORDERED, that this judgment is a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

DATED at Denver, Colorado, this 11th day of December, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

/s/
Stephen P. Ehrlich,
Chief Deputy Clerk

C. Findings of Fact and Order for Default Judgment, filed December 11, 1984, in the Colorado District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-M-2163

SUSAN THERESE FULTZ
A/K/A SUSAN FULTZ-SMALL,
Plaintiff,
vs.
MASON H. ROSE, V., et al.,
Defendant

FINDINGS OF FACT AND
ORDER FOR DEFAULT JUDGMENT
[Filed December 11, 1984]

THIS MATTER having come before this Court on December 5, 1984 upon the hearing on Plaintiff's Motion for Default Judgment Against Defendant Rose and the Court having received documentary and testimonial evidence thereon; and

MAKES THE FOLLOWING FINDINGS OF FACT

1. That Plaintiff Susan Fultz (Fultz) filed the within action against Defendant Mason H. Rose, V (Rose) on November 10, 1983. Plaintiff is a citizen of the State of Colorado, and Defendant Rose is a citizen of the State of California.

2. That on February 20, 1984, substituted service was made upon Wynona Rose, the wife of Defendant Rose, in the City of Rolling Hills, California.

3. That on February 16, 1984, service of summons and complaint was made by registered mail upon Defendant Rose.

4. That in response to each service of process, Defendant Rose has failed to

answer or otherwise respond to the complaint, and such failure is without lawful justification or excuse.

5. That on April 9, 1984, the Clerk of the U.S. District Court, upon proper notice to Defendant Rose, entered Defendant's default upon the docket of proceedings.

6. That on August 3, 1984, Plaintiff filed her Motion for Default Judgment, with due and proper notice thereof being given to Defendant.

7. That on October 23, 1984, this Court sent notice to Defendant Rose of its intent to conduct hearing on Plaintiff's Motion for Default Judgment.

8. That, in accordance with this Court's directive, Plaintiff served copies of all briefs, exhibits and affidavits upon Defendant Rose on November 16, 1984 and again on November 30, 1984, with proof of service having been made in each instance.

9. That upon each notice as heretofore described, Defendant Rose has not made or caused to be made any answer, response or objection to this Court or to Plaintiff's counsel.

10. That upon the hearing of December 5, 1984, this Court received into evidence Plaintiff's Exhibits 1-14 and 17-19, together with the testimony of Susan T. Fultz and Richard Speck, as well as the affidavits of H. L. "Buster" Quist and James A. Beckwith.

11. That the factual circumstances pertinent to jurisdiction and Plaitiff's claims; as disclosed in the evidence before this Court are as follows:

a. In May, 1976, Plaintiff's husband was killed in a helicopter crach while upon service to the U.S. Navy.

b. In December, 1976, Plaintiff received inquiries from an agent of Defendant Rose regarding her interest in

prosecuting wrongful death litigation against third parties.

c. In December, 1976, Defendant Rose contacted Plaintiff by telephone encouraging her to retain Defendant's services in prosecuting such wrongful death litigation.

d. In December, 1976, and resulting from the prior telephone conversation, Defendant Rose conducted a personal meeting with Plaintiff at a hotel in the City and County of Denver, Colorado during which Defendant discussed his theory of liability, the nature of the claims and his contingency fee arrangement. As a result of this meeting, Plaintiff and Defendant entered into an attorney-client relationship.

e. In June, 1980, Defendant successfully settled the wrongful death claims with funds then being due to Plaintiff in the approximate amount of $100,000.

f. During June, 1980, Defandant Rose undertook to advise Plaintiff of investment opportunities for such settlement proceeds in restaurant ventures located in the State of Arizona. The nature of Defendant's proposal was for Plaintiff to purchase certain restaurant equipment with the proceeds of the wrongful death settlement. This equipment would then be leased to Let-Us Developers of Arizona, Inc. d/b/a Salad Bar of Cinema Park. Defendant Rose was a shareholder in Let-Us Developers of Arizona.

g. In determining the advisability of such an investment, Plaintiff relied totally and exclusively upon the advice and representations of Defendant Rose, who was then acting as her attorney and who had voluntarily undertaken to act as her investment counselor.

h. The nature of the investment advised by Defendant Rose was high risk. Further,

it involved a business in which Defendant Rose then held a personal ownership, control and management.

i. On July 24, 1980, Defendant Rose met with Plaintiff and H. L. "Buster" Quist at a hotel in the City and County of Denver, Colorado. At such meeting, Defendat [sic] Rose delivered to Plaintiff the proceeds of the wrongful death settlement. Defendant Rose further discussed with Plaintiff the equipment leasing venture and the profits to be derived therefrom. Further, during this meeting, Defendant Rose verbally proclaimed his fiduciary duty to Plaintiff, as her attorney, stating that he would protect and save Plaintiff from harm or loss in the venture. The Court finds that these statments [sic] were made by Defendant with the intent to induce Plaintiff to rely thereon and invest in the venture. The Court

further finds that Plaintiff did rely upon the Defendant's representations and delivered at that meeting the sum of $70,000 to be used to purchase the restaurant equipment.

j. Subsequent to the July, 1980 meeting, Plainfiff received at and executed in Denver, Colorado Articles of Limited Partnership for Fultz Leasing Company. Additionally, she recieved [sic] a duplicate original of the Equipment Lease Agreement between Fultz Leasing and Let-Us Developers of Arizona.

k. On September 15, 1980, Defendant Rose executed and caused to be delivered to Plaintiff a letter in which he, first, acknowledged his continuing fiduciary duty to Plaintiff as her attorney and, second, personally guaranteed payment of the equipment lease.

l. Plaintiff received monthly payments on the equipment lease obligations up to

and including November, 1981. From and after December 1, 1981, neither Plaintiff nor Fultz Leasing Company has received any payment of monthly lease obligations on the lease.

m. In or about November, 1981, Defendant Rose took physical possession of the restaurant equipment and removed same to one Sunday's Restaurant located in Rolling Hills Estates, California. At the time of taking physical possession, Defendant Rose had an ownership interest in Sunday's Restaurant. Further, Defendant Rose represented at such time that he continued to be Plaintiff's attorney.

n. From and after November, 1981, Plaintiff and H. L. "Buster" Quist made repeated inquiries to Defendant Rose by telephone and correspondence as to the precise location of and payments for the restaurant equipment. Defendant

Rose did not respond to any such inquiries, nor did Plaintiff receive any moneys as required by the lease agreement.

o. On one occasion during this period, H. L. "Buster" Quist visited Sunday's Restaurant in California and determined that the restaurant equipment identified to the lease Agreement was then and there installed and being used.

p. Pursuant to Section 5 of the Equipment Lease Agreement, the total lease obligation was $94,353.63, of which Plaintiff received $21,247.53 up to and including November, 1981. The unpaid balance thereof is, therefore, the sum of $73,109.10. Section 5 of the Lease Agreement provides an interest rate on any unpaid balance at fifteen percent (15%) per annum. Section 20 of the Lease Agreement confers the right to attorney's fees and costs in the event of default.

q. Pursuant to the Affidavit of Plaintiff's counsel, Plaintiff has incurred to date $9,917.19 attorney's fees and expenses in this matter to date and court costs in the sum of $570.50. All of such sums are found, as a factual matter, to be reasonable and necessary costs, fees and expenses in this matter.

r. As further disclosed by the evidence, Defendant Rose has, since December, 1981, adopted a tactic of virtual and inexcusable silence regarding the inquiries, and, later, demands by Plaintiff. This tactic has continued through the institution and prosecution of the present litigation up to and including the hearing on the Motion for Default Judgment.

s. Evidence presented at the hearing, from Mr. Richard Speck, suggests that Defendant Rose's personal residence, located

at 37 Crest Road West Rolling Hills, California, has a probable market value of $750,000, with a 1974 mortgage in an original sum of $115,000, on said property.

t. Further evidence of Defendant's financial net worth is practicably unreachable owing to the refusal of Defendant Rose to respond to the Complaint filed herein.

AND MAKES THE FOLLOWING CONCLUSIONS OF LAW

1. That service of process upon the Defendant Rose, in each instance, was proper and in full comportment with Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP.

2. That Defendant Rose is in full and complete default before this Court upon the claims made against him by Plaintiff Fultz, and, thus, the allegations made therein may be construed as true and accurate.

3. That Plaintiff's evidence fully and completely sustains the allegations and claims made against Defendant Rose including the following:

a. That Defendant Rose knowingly and willfully breached the terms of the September 30, 1980 lease guarantee given by him to Plaintiff in the principal sum of $73,109.10, together with interest thereon at fifteen percent (15%) per annum from December 1 1981 and, therefore, Defendant Rose is liable for same in the full amount of $106,128.34, including principal and interest to December 5, 1984.

b. That Defendant Rose is further liable for attorney fees and expenses, excluding court costs, in the sum of $9,917.19, pursuant to the lease agreement and guarantee thereof by Defendant Rose;

c. That Defendant Rose, knowing and

proclaiming his fiduciary duty to Plaintiff as her attorney, willfully and knowingly violated and breached such fiduciary duty, owed to Plaintiff by him;

d. That in violating his fiduciary duty owed to Plaintiff, Defendant acted maliciously, oppressively and fraudulently as those terms are defined in the California Civil Code, Section 3294 and deemed applicable by this Court to Defendant Rose as a licensed California attorney.

e. That as a proximate result of Defendant's conduct in breaching the lease guarantee and the attorney's fiduciary duty, the Plaintiff has suffered specific financial damages in the sum of $106,128.34, together with the betrayal of trust and confidence arising from the attorney-client relationship.

4. That this Court, sitting under

diversity jurisdiction pursuant to 28 USC 1332, has jurisdiction over Defendant Rose pursuant to Section 13-1-124 CRS, (1973) (Colorado long arm statute).

5. That venue in this Court is proper pursuant to the terms of 28 USC Section 1391, inasmuch as Plaintiff is a resident and citizen of the State of Colorado.

6. That with respect to Plaintiff's claim for punitive damages, this Court is empowered to exercise its discretion with respect to the conduct of the Defendant Rose. In so doing, this Court is mindful of the fact that Defendant Rose is an attorney, licensed by the State of California. On the evidence presented to this Court, which is uncontradicted, Defendant Rose has caused the appearance, if not the fact, of numerous violations of ethical and legal standards applicable to attorneys and counselors at law. His conduct is deemed so egregious and offensive to

responsible and ethical behavior by attorneys as to compel this Court to award punitive damages. Any other course of action by this Court would be deemed to approve of or reward the Defendant Rose for his conduct. Such extraordinary circumstances as exist compel this award, even upon a default judgment as requested here. In measuring the amount of punitive damages, this Court deems it necessary to forego the customary measure of such damages, and to adopt that standard customarily applied to prevent and prohibit anti-trust activities. Therefore, this Court, in the full exercise of its discretion, adopts the standard of trebling the compensatory damages to Plainfiff in awarding punitive damages.

AND THEREFORE THE COURT ORDERS

1. That the Clerk of this Court shall forthwith enter judgment in this matter in favor of the Plaintiff Fultz and against

Defendant Mason H. Rose V in the following sums:

a. Compensatory damages in the sum of $106,128.34, including interest on the unpaid lease value at fifteen percent (15%) per annum to date of judgment;

b. Attorney fees in the sum of $9,917.19, pursuant to the Equipment Lease Agreement;

c. For total compensatory damages of $116,045.53.

d. Punitive damages in the sum of $348,136.59;

e. Court costs, as determined by the local Rules of Court, in the sum of $570.50

f. For a total judgment of $464,752.62, which sum shall bear interest at the statutory rate from date of entry of judgment.

2. The Court further orders and directs James A. Beckwith, Plaintiff's counsel, to forthwith assume responsibility for the

initiation and presentation of grievance proceedings against Defendant Mason H. Rose, V before the applicable committees or agencies of the California Supreme Court.

3. The Court further orders that the judgment against the Defendant Mason H. Rose, V is directed to be entered as a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

Dated: December 11, 1984

BY THE COURT

/s/
Richard P. Matsch
United States District Judge

APPENDIX C: NINTH CIRCUIT JUDGMENT SOUGHT TO BE REVIEWED, AND ORDER ON REHEARING

A. The Judgment Sought to Be Reviewed: Unpublished Memorandum Decision of the Ninth Circuit Court of Appeals, Filed June 10, 1987, Dismissing the Appeals as Moot.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH

SUSAN THERESE FULTZ, a/k/a SUSAN FULTZ-SMALL, Plaintiff-Appellee,
v.
MASON H. ROSE, V, Defendant-Appellant.

M E M O R A N D U M*
[Filed June 10, 1987]

Appeal from the United States District Court for the Central District of California - Terry J. Hatter, Jr., District Judge, Presiding - Argued and Submitted December 3, 1986 - Pasadena, California

Before: ANDERSON, PREGERSON**, and CANBY, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon.

Appellant, Mason Rose (Rose), filed separate appeals from two judgments rendered by the United States District Court for the Central District of California. In both appeals, Rose attacks the validity of a default judgment entered against him by the United States District Court for the District of Colorado arguing that the Colorado court lacked personal jurisdiction over him because of improper service of process. These appeals were consolidated along with appellee's, Susan Fultz's motion in this court to dismiss on the ground of mootness or to suspend Rose's appeals.

I. FACTS

On November 10, 1983, Fultz filed an action against Rose, an attorney, in the Colorado district court. Fultz made several unsuccessful attempts to serve Rose personally, both at his California residence and California law office. On

February 20, 1984, Fultz served Wynonah Rose, appellant's wife, at a residence located at 37 Crest Road West, Rolling Hills, California. In addition, Fultz sent a summons by registered mail to Rose's law office on February 21, 1983.

Fultz made several motions over a period of eight months, the last of which was a motion for default. Rose failed to answer or appear in any of these motions. On December 5, 1984, Fultz obtained a default judgment against Rose from the Colorado district court awarding her $116,616 for compensatory damages and $348,137 for punitive damages, based on claims of personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

On January 17, 1985, Fultz filed an action in the United States District Court for the Central District of California to enforce her Colorado judgment against

Rose. She subsequently served notice on Rose to take a debtor deposition. When Rose failed to appear for the deposition, Fultz sought to hold him in contempt. District Judge Terry J. Hatter denied Fultz's contempt motion, but ordered Rose to attend a subsequent deposition. Rose attended the deposition as ordered, but refused to answer questions relating to anything other than personal jurisdiction. As a result, Fultz filed a second motion for contempt against Rose. At the same time that Fultz filed her contempt motion, Rose filed a motion to set aside the default judgment of the Colorado court pursuant to Rule 60, Fed.R.Civ.P., because of lack of personal jurisdiction in the Colorado district court.

The court set the hearing on Fultz' motion for contempt for July 15, 1985. The court took Rose's motion to set aside the Colorado judgment off the calendar.

At the July 15th hearing, the parties' arguments focused on the validity of the Colorado judgment. Judge Hatter ruled against Rose on his motion to set aside the Colorado judgment and, in addition, found Rose in contempt for failing to comply with the earlier court order to participate in the debtor deposition. Rose appeals both decisions to this court.

On November 18, 1985, Rose filed a motion under Rule 60(b) to set aside Judge Hatter's July 15, 1985 decision. Judge Hatter denied Rose's motion on December 18, 1985. In March, 1986, this court consolidated Rose's two appeals and remanded them nunc pro tunc so the district court could dispose of Rose's November 18, 1984 Rule 60(b) motion.

On December 11, 1985, while pursuing his Rule 60(b) motion in the California district court and his appeal to this court, Rose filed a Rule 60(b) motion in

the Colorado district court for relief from the punitive damages and to correct the default judgment entered by that court in December, 1984. Rose offered to confess liability for compensatory damages. On March 14, 1986, Fultz filed a motion in this court to dismiss both of Rose's appeals while her case in Colorado is being litigated.

II. DISCUSSION

The single issue addressed by this court is whether Rose's appearance in the Colorado district court to set aside the default judgment renders moot the appeals filed by both Fultz and Rose. We find that it does.

The underlying argument in the consolidated appeals before this court is that the Colorado district court lacked jurisdiction over Rose because he was never properly served in accordance with the provisions of Rule 4 of the Federal Rules

of Civil Procedure. Therefore, if the Colorado district court had personal jurisdiction over Rose, either because Rose conferred jurisdiction upon the Colorado district court, or Rose waived his right to complain of a defect in service or personal jurisdiction, then the appeals before this court can properly be dismissed as moot. We find that both events occurred.

Jurisdiction attaches if a defendant makes a voluntary general appearance. Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982), appeal after remand 761 F.2d 525 (9th Cir. 1985).

> Generally, an appearance in an action involves some presentation or submission to the court. [citation omitted]. An appearance may result from the filing of an answer without raising jurisdictional defects. An appearance may also arise by implication "from a defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the juridiction or by reason of some act or proceedings

> recognizing the case as in court." 6 C.J.S. Appearances Section 18 at 22 (1975). [citation omitted].

Cactus Pipe & Supply v. M/V Montmarte, 756 F.2d 1103, 1108 (5th Cir. 1985). On December 11, 1985, Rose filed a Rule 60(b) motion in the Colorado district court to set aside the default judgment entered by that court one year earlier. In that motion, Rose only challenged the punitive damage award against him. (He later withdrew his confession of liability to compensatory damages and now contests that too). Rose informed the Colorado court that he was challenging the jurisdiction of that court to this court, but he did not raise any jurisdictional challenges before the Colorado court itself. We find that Rose's actions constituted a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction.

Furthermore, Rose waived the defect of

lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson, 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987)(general appearance by defendant failing to dispute personal jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Rose's argument that he has not waived his jurisdictional challenge because he raised and maintained his jurisdictional challenge in the California district court and now in this court on appeal is unpersuasive and the cases to which he cites for support are inapposite. See Chase v.

Pan-Pacific Broadcasting, Inc., 750 F.2d 131, 134 (D.C. Cir. 1984); Fahey v. O'Melveny & Myers, 200 F.2d 420, 451 n.9 (9th Cir. 1952); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.), cert. denied 322 U.S. 740 (1944). These cases held that a defendant does not waive his jurisdictional defenses if he meshes them with defenses on the merits. Furthermore, in each of these cases, the defendant objected to the jurisdictional defect in a pre-answer motion or in the answer itself before the court in which he was appearing. In the case at bar, Rose did not raise a jurisdictional defense in the Colorado court.

The district court's order of July 15, 1985, upholding the validity of the default judgment and finding Rose in contempt is VACATED. The consolidated appeals before this court are DISMISSED as moot. The parties may now pursue this

case before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits.

B. Order on Rehearing: Unpublished Order of the Ninth Circuit Court of Appeals, Filed December 17, 1987, Denying Rose's Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH

SUSAN THERESE FULTZ, a/k/a SUSAN FULTZ-SMALL, Plaintiff-Appellee,
v.
MASQN H. ROSE, V, Defendant-Appellant.

O R D E R
[Filed December 17, 1987]

Before: ANDERSON, PREGERSON,* and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for

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*Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon.

rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D: EXCERPTS FROM ROSE'S MOTION PAPERS */ IN THE COLORADO DISTRICT COURT

A. Rose's 12/11/85 Motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT, BY REASON OF MISTAKE AND MISREPRESENTATION [FRCP 60(b)(1) and 60(b)(3)], AND BY REASON OF CLERICAL MISTAKE [FRCP 60(a)]

[Filed December 11, 1985]
[Caption Omitted]

Defendant MASON H. ROSE, V ("Rose"), by and through his counsel of record, James M. Weinberg of Los Angeles, California and

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*/ These are Rose's filings in connection with his Colorado Rule 60 motion that the Ninth Circuit held was "a voluntary general appearance" (App. C at 50a). These filings were before the Ninth Circuit in connection with Fultz' motion to dismiss the appeal. We here reproduce the entire motion, and excerpts from other filings, to show Rose not only "informed the Colorado court that he was challenging the jurisdiction of that court to [the Ninth Circuit]" (Ibid.), but he also presented to the Colorado court the facts and law relevant to jurisdiction, clearly asserting that his motion was in addition to--not instead of--his voidness claim.

Richard W. Breithaupt of McGuire, Cornwell and Blakey, Denver, Colorado, herewith submits his motion for an order granting relief from this Court's default judgment entered December 11, 1984. This motion is made pursuant to Rule 60 of the Federal Rules of Civil Procedure, by reason of:

(a) Mistake, inadvertence, surprise, or excusable neglect [Rule 60(b)(1)];

(b) Fraud, misrepresentation, or other misconduct of counsel for Plaintiff Susan Therese Fultz a/k/a Susan Fultz-Small ("Fultz"), an adverse party [Rule 60(b)(3)]; and

(c) Clerical mistakes in the default judgment, arising from oversight or omission [Rule 60(a)].

This motion is the first of two major motions which, as Rose now contemplates, will be filed in this Court within a few days of each other. The second contemplated motion is a motion for relief from

the default judgment for the reason that the judgment is void [Rule 60(b)(4)]. This motion is filed before the voidness motion (although the granting of the voidness motion would make this motion moot), because motions under Rules 60(b)(1) and 60(b)(3) [but not 60(b)(4)] must be made within one year after entry of judgment, and time does not permit the filing of both motions within the one-year period which ends on December 11, 1985.

In support of the present motion, Rose states and avers the following grounds:

A. GROUNDS RELATING TO BOTH RULE 60(a) AND RULE 60(b):

1. There were errors in the mathematical computation of the damages, arising from oversight or omission. Such errors may and should be corrected as clerical mistakes under Rule 60(a), or as mistakes under Rule 60(a)(1) [sic; this should be "60(b)(1)"]. In the Findings of Fact and

Order for Default Judgment ("12/11/84 Findings"), Conclusion 6 stated that "this Court . . . adopt[s] that standard customarily applied to prevent and prohibit anti-trust activities" and "Therefore . . . adopts the standard of trebling the compensatory damages to plaintiff is [sic; this should be "in"] awarding punitive damages." However, there were errors in the application of that standard, in that:

(a) The compensatory damages were quadrupled rather than trebled. Anti-trust damages are an overall total of three times the compensatory damages, plus costs and attorney's fees; thus the punitive portion is twice (rather than three times) the compensatory portion. Correct application of the announced standard would have resulted in an overall total of $318,385.02 in treble damages (of which $106,128.34 was compensatory and 212,256.168 would be

punitive). Because of this error, punitive damages were overstated by 100% of the compensatory damages, which is $106,128.34.

(b) Attorneys' fees, as well as compensatory damages, were quadrupled. In antitrust awards, attorneys' fees are added in once, after compensatory damages are trebled. Because of this error, punitive damages were overstated by three times the attorneys' fees of $9,917.19, resulting in an award that was excessive by $29,751.57.

B. GROUNDS RELATING ONLY TO RULE 60(b).

2. Fultz' claim for punitive damages was based on California law (12/5/84 Findings, p. 6, Conclusion 3d). Under California law, an antitrust standard is not appropriate for determining the amount of punitive damages. Instead, according to the leading case of Neal v. Farmers Insurance Exchange, 21 Cal.3d 910, 928, 148

Cal.Rptr. 389, 582 P.2d 980 (1978), the factors to be considered are (1) "the particular nature of the defendant's acts in light of the whole record;" (2) "the amount of compensatory damages awarded;" and (3) "the wealth of the particular defendant".

3. Here the award was confiscatory, when compared with the only evidence of net worth that was before the Court. The evidence (which was fraudulently or negligently overstated, as shown in Paragraph 4 below) shows a single asset consisting of $635,000 in home equity, made up of a $750,000 market value less a $115,000 mortgage (12/11/84 Findings, p.5, Finding 11s); that evidence further shows liabilities to Plaintiff Fultz (excluding punitive damages) in the total amount of $116,616.03, made up of $106,128.34 for compensatory damages, $9,917.19 for attorney's fees, and $570.50 for court costs

(12/11/84 Findings, p. 5, Findings 11q and p. 6, Conclusions 3(a) and 3(e)). That evidence thus shows a net worth of $518,383.97 ($635,000 less $116,616.03). The punitive damages of $348,136.59 were thus 67.1% of the net worth shown in the evidence before the Court.

4. Fultz has fraudulently or negligently (1) overstated the equity in the Rose family home (as of the default hearing on December 5, 1984) by more than $250,000; and (2) overstated Rose's one-half interest in that equity by more than $440,000. Most of this overstatement was due to Fultz' failure to pick up (or failure to disclose) a second lien on the property, in favor of Ellis Ring, recorded in Los Angeles County on April 27, 1984. Document No. 84-507119. The original principal amount of that lien, and also its principal amount on the 12/5/84 hearing date (payments are interest only, and were

then current), was $275,000.00 As of 12/5/84, the first lien had been paid down to $90,771.93. Deducting both liens from the $750,000 market value in evidence leaves an equity of $384,228.07. Furthermore, as a check of the record would have shown, Rose and his then wife (Wynonah D. Rose), were co-owners of the property (they still are), so Rose's 50% share of the true equity was $192,114.04. Thus Rose's share of the equity, and his net worth, were overstated by $442,880.96. Correction of the overstatement would have reduced the net worth shown by the evidence (see Paragraph 3 above) from $518,383.97 to $75,503.01, and the 348,136.59 punitive damage award was 461.1% of the corrected net worth figure.

5. It was not proper "to find that to default in a case amounts to a further basis for punitive damages" (12/5/84 Transcript, at 45:17 to 46:1, 12/5/84

Findings, Finding 11r. Aside from the general propriety of such a finding, . . . (1) here Rose was faced with a huge claim for punitive damages, not just a claim for his obligations to Fultz, so his failure to appear cannot be construed as fraud, opression [sic] or malice toward Fultz; (2) here, had Fultz been open with the Court, rather than failing to clearly disclose the facts relating to service (see below), the Court would have known there was a defect in (or at least a serious question about) service of process; and (3) as stated below, and in Rose's declaration, Rose reasonably and in good faith believed that he had not been served and had no duty to defend.

6. Fultz sent Rose certain documents in connection with the scheduled default hearing. Among the documents sent to Rose was a "Submission of Exhibit G to Plaintiff's Motion for Default Judgment",

submitted on or about August 23, 1984. That document advocated (in Paragraph 7) a formula for computing punitive damages, and closed with a prayer, in which "Plaintiff prays for Judgment in her favor on her claim for punitive damages in the sum of $147,280, or such other sum as this Court deems fair and reasonable." The "or such other sum . . ." can reasonably be interpreted to refer only to a lesser sum. In any event, punitive damages should not have exceeded the amount specifically prayed for in the papers served on Rose in connection with the default hearing. The actual award of punitive damages that exceed the prayed-for amount by over $200,000 was grossly unfair.

7. Any award of punitive damages in this case is a violation of Rose's due process and other constitutional rights, under the Fourth, Fifth and Sixth Amendments to the United States Constitution,

for the reasons discussed by Professor Malcolm E. Wheeler of the University of Kansas, in his article on "The Constitutional Case for reforming Punitive Damages Procedures", 69 Va.L.Rev. 269 (1983). These reasons are particularly powerful where (as here) the punitive damages were awarded on default, and where the conduct is the subject of a State Bar of California grievance proceeding that was instituted by order of this Court as part of the default judgment.

8. Whether or not punitive damages in this case are unconstitutional, the availability and actual use and pendency of State Bar of California grievance proceedings reduces or eliminates the need for punitive damages, which in California are imposed "to punish wrongdoers and thereby deter the commission of wrongful acts." Neal v. Farmers Insurance Exchange, supra, 21 Cal.3d at 928, fn. 13.

9. Fultz fraudulently or negligently prevented this Court from recognizing the jurisdictional questions relating to service of process, and from making an informed decision on those questions, by failing to clearly inform the Court (e.g., in Paragraph 2 and 3 of Plaintiff's Motion for Default Judgment): (1) that there had been no acknowledgment of mailed service; (2) that the return receipt for the mailed service was not signed by Rose; and (3) that both mailed and submitted [sic; this should be "substituted"] service had been made outside the State of Colorado.

10. If (contrary to law and fact) the service of process was valid, Rose was under the reasonable and good faith belief that he had not been served and had no legal duty to appear and defend. That belief was induced in part by the form of acknowledgment required by the Federal Rules and sent by Fultz with the mailed

service; from it, Rose reasonably and in good faith believed that (1) service by mail had not been completed, because he had not returned the acknowledgment (within the 20-day period, or at all), and he had not even received the mailing within the 20-day period; (2) no default could be entered against him because of the attempted service by mail, since he did not complete and return the acknowledgment form; and (3) another attempt at service "in any other manner permitted by law" would probably be made thereafter, and he risked liability for expenses of that service--and no more--by not having returned the form within 20 days. He did not know until March 1985, long after the default judgment was entered, that Fultz would claim to have made substituted service on his estranged wife.

11. This is not an appropriate case for punitive damages. The evil motive, and the oppression, fraud and malice required under California law, were all not present. The true facts are as stated in Rose's affidavit, and any contrary facts in the 12/5/84 Findings were due to Fultz' fraud and/or negligence. By way of example only, the crucial fact of inexcusable silence regarding Fultz' inquiries and demands (Finding 11r) is utterly untrue. Through Defendant Quist, Rose made an offer (to Fultz' attorney) to pay $30,000 for the equipment removed to California, prior to September 4, 1983; neither Rose nor Quist received a response to that offer, and suit was commenced two months later.

WHEREFORE, for the foregoing reasons, Rose prays for appropriate relief from the default judgment, including the elimination of punitive damages, and that he

be permitted to confess judgment for the compensatory damages alone, as stated in more detail in his affidavit.

SIGNED AND SUBMITTED December 9, 1985.

[Signatures and addresses omitted]

B. Excerpts from Rose's 12/11/85 Affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AFFIDAVIT OF MASON H. ROSE, V
[Filed December 11, 1985]
[Caption Omitted]

Your affiant, MASON H. ROSE, V, upon his oath deposes and states as follows:

* * *

C. SERVICE OF PROCESS

7. Neither the summons nor the complaint in this action was ever served on me by delivery to me personally.

8. I never appeared in this action, specially or otherwise. Accordingly, the issue of the jurisdiction of this Court over me was never raised by me or litigated in this action.

(1) Attempted Service by Mail in California

9. In 1984, I was continuously out of California during the entire month of February and the first two weeks of March, in connection with a trial in the State Court in Lexington, Kentucky, which lasted from on or about February 3, 1984 through on or about March 14, 1984. I returned to California on March 14, 1984, but I was emotionally drained from the six-week trial in Kentucky and did not return to my office in any meaningful way for some weeks thereafter.

10. After my return to my office (I do not recall exactly when, but it was at least several days after March 14, 1984), I found at the office the papers that had been sent to me by Plaintiff's counsel pursuant to Rule 4(c)(2)(c)(ii). These papers included copies of the summons and complaint in the Colorado action, together

with a form captioned "NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMLAINT"; a copy of that form is attached to this affidavit as Exhibit B [Exhibit B is substantially in the form of Official Form 18-A, Fed. R. Civ. P. Appendix of Forms]. Another copy of that form, together with copies of a receipt for certified mail dated February 16, 1984 and a return receipt signed by Lisa Rankins and showing February 21, 1984 as date of delivery, were attached as Exhibit B to Plaintiff's Motion for Default filed in this Court on or about August 3, 1985 [sic; this should be "1984"]. From those exhibits, it appears that these papers were sent by certified mail on February 16, 1984, addressed to me at my office in California. They were received by me, over a month later, at my office in California.

11. Lisa Rankins was never employed by me. She was not my secretary on February

21, 1984 or at any other time. I had no personal secretary on February 21, 1984 while I was in trial in Kentucky. My own personal secretary had terminated her services just prior to my leaving for that trial. Lisa Rankins was the personal secretary of Hofton L. Ballou, one of the other attorneys in our law suite. She did not call to my attention the papers she signed for on February 21, 1984, and I was unaware of them until I found them as described above.

12. I never signed or returned the acknowledgment in Exhibit B. Since I did not receive Exhibit B or the other enclosed papers until more than a month after the date (February 16, 1984) shown in Exhibit B, it was obviously too late to return the acknowledgment "within 20 days", as specified in Exhibit B.

13. Although I knew from Exhibit B and the other enclosed papers that this action

was pending and that Plaintiff had attempted to serve me by mail, I did not now [sic; this should be "know"] that Plaintiff would claim that service of process had already been completed (either by mail or by any other means), or that I then had any duty to defend or was otherwise answerable to Plaintiff's claim in this action. On the contrary, Exhibit B led me to believe, and I did believe, (1) that service by mail had not been completed, because I had not returned the acknowledgment (within the 20-day period or at all), and I had not even received the mailing within the 20-day period; (2) that no default could be entered against me because of the attempted service by mail, since I did not complete and return the acknowledgment form; (3) that another attempt at service "in any other manner permitted by law" would probably be made <u>thereafter</u>, and that I risked liability for the

expenses of that service--and no more--by my not having returned the form within 20 days.

(2) Attempted Substituted "Place of Abode" Service in California

14. Although there were references to Plaintiff's alleged substituted service on Mrs. Rose in some of the many papers sent to me at the time of the default proceedings, I did not become aware of Plaintiff's claim of substituted service until on or about March 8, 1985, when Plaintiff's counsel, Mr. Beckwith, advised me of it in a telephone conversation. Mr. Beckwith had not sent me a copy of the Return of Service (signed by process server Ron Hughes and dated February 22, 1984) when it was filed in this action.

15. I never received the copy of the summons and complaint that Mr. Hughes said (in the Return of Service) he served on Mrs. Rose, on February 20, 1984, at 37

Crest Road West ("37 Crest"), Rolling Hills, California. Mrs. Rose did not give them to me, and she has never told me or admitted to me that she received them. On the contrary, on or about April 15, 1985, she denied having been served.

16. At the time of the alleged substituted service on Mrs. Rose on February 20, 1984, 37 Crest was neither my dwelling house nor my usual place of abode. On February 20, 1984, I had permanently separated from Mrs. Rose and was living temporarily with Emma Faulk at the apartment of John Y. Brown, Sr. in Lexington, Kentucky; and (2) my permanent home and usual place of abode was with Emma Faulk at her home ("4100 Quinlin") located at 4100 Quinlin Drive, Palos Verdes Peninsula, California. Except for brief absences of less than a week each and the longer absence, when I was engaged in a trial in Kentucky as mentioned above, 4100 Quinlin has been my

home and my usual place of abode at all times since I separated from Mrs. Rose in November, 1983.

17. As of February 20, 1984, the date of alleged substitute service on my estranged wife, I had no intention of returning to live with Mrs. Rose or of returning to live at 37 Crest, and I have not done so at any time since; on April 17, 1985, I filed for a dissolution of my marriage to Mrs. Rose in the Los Angeles County Superior Court; a final judgment of dissolution was entered October 31, 1985.

18. As of February 20, 1984, I had every intention of continuing to live with Emma Faulk and of continuing to live at her home at 4100 Quinlin upon my return to California, and I have done so at all times since my return to California on March 14, 1984, except for brief absences from 4100 Quinlin of less than a week each.

19. At all times since our separation, Mrs. Rose has expressed a great deal of anger and hostility toward me and Emma Faulk, and there has been very little communication between us. Even if Mrs. Rose had received the papers that Plaintiff's process server claims to have served on her, it is very unlikely that she would have delivered them to me or told me about them.

C. Excerpts from Rose's 12/11/85 Brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT JUDGMENT UNDER FRCP 60(b)(1), 60(b)(3) AND 60(a)
[Filed December 11, 1985]
[Caption Omitted]

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* * *

INTRODUCTION

The present motion seeks relief from this Court's default judgment entered December 11, 1984, by reason of mistake

[Rule 60(b)(1)], misrepresentation [Rule 60(b)(3)], and clerical mistake [Rule 60(a)]. This motion is supplementary to two other proceedings, one pending and one contemplated within a few days, in which Rose asserts that the default judgment is void. The pending proceeding is an appeal to the Ninth Circuit Court of Appeals, from a contempt order of the California District Court where the default judgment was registered. The contemplated proceeding is a motion to be made in this Court, under Rule 60(b)(4), to set aside the default judgment.

Our contention in those other proceedings is that the default judgment is patently void for lack of personal jurisdiction over Rose, because there was no valid service of process. Neither the federal rules nor the Colorado rules permit the service attempted here--mailed service and substituted service, both in California--

to be made outside the State of Colorado in which this Court sits. As to the federal rules, see FRCP 4(f); Davis v. Musler, 713 F.2d 907, 913 (2d Cir. 1983); Epstein v. Wilder, 596 F.Supp. 793, 796-97 (N.D. Ill. 1984). As to the Colorado rules, see CRCP 4(f)(1); Krendl, 1 Colorado Practice, Methods of Practice (3d ed. 1983) 401; Hardaway & Hyatt, 4 Colorado Practice, Civil Rules Annotated (2d ed. 1985) 20.

We recognize that logically the present motion should only be made after our voidness contentions are ruled on, and then only if we lose on voidness. If we win on voidness, the present motion is moot. Nevertheless, we make it now (1) because we are faced with a one-year time limitation for motions under Rules 60(b)(1) and 60(b)(3); (2) because there is no guarantee that we can get a correct ruling that the default judgment is void; and (3) even if we succeed in getting such a correct

ruling, it may be helpful to the Court and the parties if we raise punitive damage issues now, as they would be relevant to a later settlement or trial. As pointed out in the following Preliminary Statement, our objective in all of these proceedings is not to avoid--but rather to obtain--a merits determination or settlement of Rose's obligations to Fultz.

D. Excerpts from Rose's 3/31/86 Withdrawal of Offer.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDANT ROSE'S WITHDRAWAL OF OFFER TO CONFESS JUDGMENT, AND REPORT ON STATUS OF OTHER PROCEEDINGS
[Filed March 31, 1986]
[Caption Omitted]

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* * *

B. Report on Status of Other Proceedings

1. Rose's appeal to the Ninth Circuit has now been fully briefed.

Both sides have now fully briefed Rose's appeal to the Ninth Circuit (No. 85-6202).

The principal issue there is Rose's contention that this Court's default judgment was void for lack of personal jurisdiction, based on failure to serve process. Rose's Appellant's Reply Brief was served March 21, 1986. For this Court's information, copies of the briefs of both sides will be lodged herewith. In addition to Rose's Appellant's Reply Brief, they include his Appellant's Opening Brief, and Fultz' Appellee's Answer Brief.

2. Our contemplated voidness motion in this Court has been deferred until after the ruling of the Ninth Circuit.

In our motion papers filed in this Court on December 11, 1985, we stated that we contemplated filing a second motion within a few days, asserting that the default judgment was void and asking this Court to set it aside. We did not file that motion as we then contemplated,

because further research convinced us that the only remedy to which we were entitled as of right was in pursuing the appeal that we had already filed in the Ninth Circuit. Accordingly, we will continue that pursuit in the Ninth Circuit, if (as we expect) Fultz' pending motion to dismiss or suspend our appeal is denied.